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No. 77-286

In the Supreme Court of the United States

October Term, 1977

United States of America, Petitioner

v.

Harriet McGarry, ET AL.

United States of America, Petitioner

v.

Patricia McGarry Schell

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jack Streeter, Esq.
30 Court Street
Reno, Nevada 89501

Bradley & Drendel, Ltd.
Post Office Box 1987
Reno, Nevada 89505

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Jack Streeter, Esq., on behalf of Harriet McGarry, et al., and Patricia McGarry Schell, responds to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

Respondents will not reiterate the preliminary matters presented by Petitioners at pages 1 through 7 of the Petition for Writ of Certiorari, pursuant to Supreme Court Rule 40(3). Limited references will be made to the Appendices filed by Petitioner.

REASONS FOR DENYING WRIT

The decision of the Court of Appeals, recognizing that the United States owes a duty under certain restricted circumstances to exercise reasonable care to see that proper precautions are taken by a contractor performing services for the United States, presents no issue appropriate for review by this Court. The decision is a consistent application of state tort law as it is found in the Ninth Circuit (see *Thorne v. United States*, 479 F2d 804, 1973) and Fifth Circuit (see *Emelwon v. U.S.*, 391 F2d 9, 1968). In the latter case, this Court has previously denied review (cert. denied. 393 U.S. 841, 89 S.Ct., 119, 21 L.Ed2d 111).

1. Under the Federal Torts Claims Act, the United States is liable for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346 (b).

However, the United States remains immune from certain types of liability which may be imposed upon private persons, by reasons of the limitation on the waiver of sovereign immunity. By reason of this limitation on the waiver of immunity, the United States may be held liable only for negligent acts or omissions of its employees, and not for claims arising under the doctrine of strict liability or absolute liability without a showing of fault on the part of the United States. *(Laird v. Nelms*, 406 U.S. 797; *Dalehite v. United States*, 346 U.S. 15).

Similarly, by reason of the limitation of the waiver of immunity for the negligent acts or omissions of its own employees, the United States cannot be charged with liability based on the imputation of negligence of an independent contractor, even in the area of extra-hazardous activities, where the United States itself is not negligent. (*Laird v. Nelms*, supra; *Dalehite v. United States*, supra; *United States v. Page*, (C.A. 10), 350 F2d 28, cert. denied, 382 U.S. 979).

The United States places heavy reliance upon authorities relating to the limitations upon liability under the Federal Torts Claims Act. The fallacy inherent in this argument is that the fact that the liability of the Government may not be as broad as the liability of a private citizen does not absolve the United States of liability where the claim falls within the sphere of liability established by the Act. While the cases cited by the United States support the contention that, in the absence of a basis for the imposition of liability by reason of the negligence of its own employees, the Government will not be held liable upon a claim based on strict liability in tort *(Laird v. Nelms*, supra*)*; the Government will not be held liable for improper exercise of a discretionary function *(Blaber v. United States*, (C.A. 2 1964) 332 F2d 629); nor will the Government be held liable for the negligence of an independent contractor, even in the performance of a non-delegable duty *(United States v. Page*, supra); the United States avoids the essential issue that when an independent contractor is employed to engage in work that is extra dangerous, the employer of the contractor has a duty to exercise

reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury from the work. *Thorne v. United States*, 479 F2d 804 (C.A. 9, 1973).

The Government maintains that because the imposition of liability on the United States in the instant case *looks* like vicarious liability, it must *be* vicarious liability. Two Courts of Appeal examined cases which squarely answered this same argument when advanced by the Government.

In *Thorne v. United States*, 479 F2d 804 (C.A. 9, 1973), Judge Merrill, in a concurring opinion, firmly quashed any argument that the Court had applied a veiled version of vicarious liability: "I should only like to emphasize that while the phrase "non-delegable duty" may conjure up visions of vicarious liability beyond the scope of the Tort Claims Act, the duty here owed by the Bureau [of Reclamation, Department of Interior], as stated by Judge Kilkenny, was to exercise reasonable care to see that proper precautions were taken by the contractor. It was breach of this duty by employees of the Bureau that results in liability of the United States." 479 F2d at 810. The *Thorne* case held that where the United States had contracted with a contractor to perform highly dangerous work, the Government was under a duty to exercise reasonable care to see that the contractor took proper precautions to protect those that might be injured.

In *Emelwon v. United States*, 391 F2d 9, (C.A. 5, 1968), the Court answered the same charge of creating

vicarious liability in violation of the provisions of the Federal Tort Claims Act. The Court explained:

> "The employer's liability is not absolute, nor is he held vicariously liable for the negligence of the independent contractor. Rather liability is imposed on the employer for his own failure to exercise reasonable care in a situation in which the work is sufficiently dangerous that the employer himself has a duty to third persons who may sustain injuries from the work unless proper precautions are taken in the performance thereof. The taking of such precautions is a duty which the employer may not delegate to his independent contractor so as to evade liability. Should injury occur under such circumstances of sufficiently great danger the employer is liable for the breach of his own "non-delegable duty" to take precautions against harm to third parties." 291 F2d at 11.

Certiorari was denied by this Court. 393 U.S. 841.

The statements and holding of these courts of appeal are clear and unequivocal: Liability is based on a breach of a duty owed by one who employs a contractor to do highly dangerous work, and does not stem from a duty owed by the contractor itself to perform work safely. Had the United States fulfilled its duty to see that the contractor took proper precautions in performing its work, no liability would attach, regardless of the finding of liability on the part of the contractor. However, as the District Court found (370 F.Supp. at 547) and the Court of Appeals affirmed, the United

States did not fulfill that duty to the contractor and is liable for damage resulting from that breach of duty. (APP.C. pg. 107a, APP. A. pg. 7a - 9a).

The duty involved runs from the United States to the contractor it employs to do dangerous work, and can be discharged by taking proper precautions. It is not an absolute duty nor does it impose strict or vicarious liability on the United States. No Court herein has abrogated any exemption to the Federal Torts Claims Act, and no basis for review of this case is presented.

2. The government maintains that the imposition of liability upon the United States in this case violates the "discretionary function" exception to the Federal Torts Claims Act. 28 U.S.C. s 2680 (a). The government maintains that it may exercise its discretion and delegate any and all duties to its contractors, and thus insulate itself from any liability.

The case relied upon by the government is *Blaber v. United States*, 332 F2d 629, 1964. In that case, the independent contractor was performing work for the United States Atomic Energy Commission, but the work was performed at facilities owned by the contractor and not the government. The District Court in the case at bar discusses extensively the duties imposed on the government *due* to its ownership and control of the hazardous electrical facilites. (App. C. pgs. 43a to 65a), which factual distinction renders vastly different the duties owed and delegable.

Two further factors obviate the necessity of this Court's determining the delegability of duty under a claimed exercise of discretionary function in the performance of hazardous activities. First, ". . . the discretionary function exception is limited to decisions made at the *planning* rather than the *operational* level." *Driscoll v. United States*, 525 F2d. 136, 138 (9th Cir. 1975).

In the case at bar, it was found that a violation of duty occurred at the *operational* level:

> "As a matter of policy, then, the A.E.C. chose to retain ssome responsibility over matters of employee safety. The meeting of that responsibility was an operational function. The manner in which responsibility was to be met was the subject of decision at the operational, rather than the planning level, and accordingly was not an exercise of a discretionary function. It must, then, meet the requirements of Nevada law." (App. A, pp. 11a).

Second, the finding that the United States retained responsibility over matters of employee safety is a finding of fact. In *Blaber v. United States*, supra, 332 F2d at 631, the Court said in this regard; "The question of the extent of the [Atomic Energy] Commission's undertaking [to oversee safety procedures] is clearly one of fact." As determined on the evidence and affirmed, that finding should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted.

Jack Streeter, Esq.

John Squire Drendel, Esq.

Attorneys for Respondents

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